U.S. Department of Labor

Office of Administrative Law Judges
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CASE NOS.: 2000-LHC-0832/2738/2739

OWCP NOS.: 1-139166/140057/135773

In the Matter of:

NICOLA J. DI FROSCIA
Claimant

v.

GENERAL DYNAMICS CORPORATION
Employer/Self-Insurer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

APPEARANCES:

Robert B. Keville, Esq.
For the Claimant

Mark W. Oberlatz, Esq.
For the Employer/Self Insurer

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on December 20, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 18	Attorney Keville's letter filing his	01/31/01
CX 19	Fee Petition	01/31/01
RX 22	Employer's comments thereon	01/31/01
CX 20	Attorney Keville's status report[1]	03/21/01

The record was closed on March 21, 2001 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On June 26, 1995, Claimant suffered an injury to both hands, upper extremities and shoulders in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on June 2, 1999.

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[1]While counsel refers to this proceeding as a Section 8(i) matter, this actually is a Decision and Order upon a stipulated record. The decision has been delayed due to this Judge's heavy trial docket and an administrative backlog at the Boston District. However, that backlog has now been corrected.

7. The applicable average weekly wage is $1,139.79.

8. The Employer voluntarily and without an award has paid temporary total compensation for various periods of time.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Nicola J. Di Froscia ("Claimant" herein), sixty-eight (68) years of age, with a high school education and an employment history of manual labor, emigrated to the United States in December of 1949 and in 1957 obtained a certificate in cosmetology from Elm City Academy, New Haven, Connecticut. He also obtained a GED in 1984 or 1985. He first worked as a machinist, then as a machine operator, and enlisted in the U.S. Marine Corps in 1952, serving honorably as a machine gunner. Upon his discharge he enrolled at Elm City Academy and, upon completion of that course, went to work for Andre's in New Haven. He worked as a hair dresser/hair stylist for about four years and he opened his own salon in 1958 or 1959; he operated the salon until 1973, at which time he became an hairstyle instructor in New Haven, performing this training for two and one half years. He moved to New London in 1980, worked elsewhere and in May of 1983 he went to work at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. He went applied for work as a grinder but, as he could not pass the grinding machine test, he transferred to work as a painter. (CX 17 at 3-19)

Claimant testified that his duties involved, **inter alia**, using grinding machines and other pneumatic tolls to clean off the rust from the metal surfaces of the submarines being built, repaired or overhauled at the shipyard. He also used pneumatic tools to sandblast rust and other debris and imperfections from the metal surfaces of the boats, Claimant remarking that as "a painter and a blaster," "You have to do everything" at the shipyard in that department. He worked all over the boats as directed by his supervisors. He daily used pneumatic tools at the shipyard for fifteen years until his last day of work there. He has been unable to work since June 17, 1997 due to the

cumulative effect of his multiple medical problems. As of his October 22, 1999 deposition Claimant was still an employee of the Employer and was out on a medical leave of absence for his work-related bilateral hand/arm problems. He has sustained a number of injuries at the shipyard and these will be summarized below. (CX 17 at 19-27)

Dr. Steven B. Carlow has been Claimant's treating orthopedic surgeon since at least November 1, 1996 (CX 2 at 34) and the doctor states as follows in his January 7, 1997 progress report (**Id.** at 30):

"Follow-up evaluation internal derangement right knee, post arthroscopic meniscectomy.

"Overall, the patient is doing reasonably well, still has some discomfort as expected with standing, difficulty kneeling and squatting. He has been doing his passive resistance exercises. He occasionally takes Ibuprofen.

"Evaluation today reveals no effusion, well-healed portals. Range of motion is essentially full in extension, lacks 5**N** short of full flexion. He has no instability.

"ASSESSMENT: I discussed the above with the patient. Will continue with aggressive stretching and strengthening activities. He will avoid kneeling and squatting.

"I do not feel he will be able to return to work at the present time due to the climbing activities. He will be followed up in one month's time. He understands he should expect some residual discomfort due to findings at surgery."

Dr. Carlow saw Claimant as needed in follow-up and, as of April 14, 1997, he reported (**Id.** at 26):

"Follow-up evaluation internal derangement post arthroscopy right knee.

"Overall, the patient is doing reasonably well, still has patellofemoral-type symptoms as expected. Activities cause some increasing swelling in the knee. He is on no medications at this time. He is attending therapy at Electric Boat Yard Hospital, and this seems to be helping.

"Evaluation today reveals well-healing arthroscopic portals, trace effusion, good patella mobility, range of motion 0-120**N** of flexion.

"ASSESSMENT: Doing well. Will continue with stretching and strengthening activities. He understands to expect some

residual pain due to his arthritic changes found at arthroscopic evaluation. He will remain on full duty and will be seen in approximately six weeks' time. Any questions or problems in between, he is to call."

As of May 28, 1997, the doctor reported (**Id.** at 25):

"Follow-up evaluation post arthroscopic medial meniscectomy on the right.

"The patient continues to work. He still has patellofemoral symptoms, no feelings of instability. He is finished physical therapy and is on a home program; he feels that this was beneficial.

"Evaluation today reveals no effusion, range of motion is 0-120**N** with pain at extremes, mild tenderness along the medial joint line and minimal crepitance on patellar compression.

"ASSESSMENT: I feel that he is doing well.

"PLAN: We will continue with a home program and continue working. At six months I feel a disability rating can be given, with respect to degenerative changes and meniscal pathology."

As of September 4, 1997 Dr. Carlow reported as follows (**Id.** at 23):

"The following report is in response to your request for medical information on Mr. DiFroscia dated June 30, 1997.

"As you know, Mr. DiFroscia sustained significant injuries to his right lower extremity, specifically his right knee on November 5, 1994. At that time, the patient was under the care of Dr. William Jones. He had multiple evaluations including aspiration and injections of the knee. The patient however, had significant disability and subsequently was seen in my office on November 1, 1996. At that time, x-rays revealed evidence of mild narrowing of the medial joint line and a question of loose bony fragments. The patient, due to significant disability, was subsequently scheduled for arthroscopic evaluation which was performed on November 22, 1996. The patient, at that time, was found to have significant pathology of the right knee including a posterior medial meniscal tear, evidence of condylar damage of the middle tibial and femoral condyles and evidence of loose bony debris. The patient underwent partial medial meniscectomy, debridement and removal of loose debris and loose body at that time.

"The patient is now approximately nine months post surgery. At this time, I feel he has reached a point of maximal medical

improvement. With a reasonable degree of medical probability, I feel he has reached a point of maximal medical improvement and again, I feel a permanent partial impairment rating can be given. This is based on the **AMA Guide For Permanent Partial Impairment**, Fourth Edition. His disability rating is based on post medial meniscectomy, debridement and removal of loose body with evidence of damage to his condylar surfaces. I feel a permanent partial impairment of 12% with respect to the right lower extremity is indicated. The prognosis for the patient's right knee is guarded. His limitations at this time would include avoidance of excessive kneeling, squatting and climbing activities. I cannot rule out the possibility of total knee arthroplasty in the distant future. I do not feel this would be necessary at least for the next 8-10 years however. If you require additional information, please feel free to call. I will be more than happy to follow the patient along."

As of November 11, 1997 the doctor reported as follows (**Id.** at 22):

"Follow-up evaluation internal derangement, degenerative joint disease right knee. The patient is here also for evaluation referred by Dr. Cherry for evaluation of aching and pain in both shoulders.

"It should be noted the patient is status post bilateral carpal tunnel syndrome and bilateral elbow ulnar nerve transpositions.

"He is complaining of aching and pain with overhead activities. He, however, has been out of work at the present time due to his multiple orthopedic problems.

"With respect to his knee, he complains of typical pain and aching with kneeling, squatting and stairs. He has no significant pain at rest and no swelling.

"Evaluation today of the right knee reveal no effusion, no instability. Range of motion is full, and there is moderate tenderness along the medial joint line. Motion is from 0-120**N** of flexion.

"With respect to his shoulders, he has positive impingement sign, mild tenderness over the coracoacromial ligament and greater tuberosity. Range of motion is full passively, actively lacks 5**N** short of full forward flexion and abduction. There is no instability.

"ASSESSMENT: Bilateral shoulder tendinitis, right knee internal derangement, degenerative joint disease.

"PLAN: I discussed the above with the patient at length. Due

to his multiple orthopedic problems, I feel it would be unlikely that he would be able to return to his prior work activities. He most likely will retire in May. I feel again he would probably be unable to return to his former work activities prior to that time.

"At this point, I would continue conservative measures, no plans for surgical intervention or further diagnostic studies. If he has persistent shoulder pain, we may consider a formal injection. He will be followed up in approximately two months' time."

As of January 19, 1998 Dr. Carlow reported as follows (**Id.** at 21):

"Follow-up evaluation, internal derangement, right knee, and bilateral shoulder tendinitis.

"Evaluation today reveals a healthy, white male in no acute distress.

"The patient states that he is still having discomfort with any kind of kneeling or squatting activities or stairs. He still has some generalized achiness in the upper extremities.

"The patient is disabled from work at this time.

"Evaluation of the right knee today reveals no effusion, mild-to-moderate pain on patellar compression, difficulty kneeling and squatting secondary to pain. He has no instability.

"Evaluation of his shoulders reveals mild-to-moderate, bilateral impingement, mild tenderness over the coracoacromial ligament, and range of motion is essentially full with mild pain at extremes of forward flexion, abduction and external rotation.

"I have discussed the above with the patient at length.

"At this point, I have no other specific recommendations. He will continue conservative measures. If his shoulder symptoms flare up, we may consider injection at some point down the line.

"At this point, I feel he is totally disabled from work activities. This would be due to the combination of his upper and lower extremity pathology.

"He will be followed up in two months' time. Any questions in-between, he is to call."

Dr. Carlow continued to see Claimant as needed and his last progress note in the record is dated February 2, 1999. (**Id.** at

14-20)

Dr. Carlow reiterated his opinions at his February 2, 2000 deposition and the transcript of his testimony is in evidence as CX 12 at 109-144.

Claimant has been evaluated at the Employer's request by Dr. John J. Giacchetto, an orthopaedic surgeon, and the doctor sent the following letter to the Employer's adjusting firm on June 8, 1998 (RX 16):

"As per your direction I performed an Independent Medical Evaluation on Nicola DiFroscia on June 1, 1998. I base my conclusions and recommendations upon a review of the available medical records, x-rays, and history and physical examination completed that day.

"Nicola DiFroscia is a 65 year old male who has been employed at Electric Boat as a blaster-painter for fifteen years. On November 1, 1994, while on the job he fell from an eight to ten feet height landing on his right side. He injured the right knee and right shoulder. He came under the care of Dr. William Jones. Dr. Jones injected both the knee and the shoulder. With conservative treatment both the knee and the shoulder improved. By the time Mr. DiFroscia was discharged from Dr. Jones' care he still had some low grade right knee and right shoulder symptoms but managed to return to work and was discharged from Dr. Jones' care. In November of 1996 Mr. DiFroscia was experiencing increasing painful catching sensations from the right knee and he was evaluated orthopedically by Dr. Steven Carlow. Dr. Carlow diagnosed an internal derangement, and on November 22, 1996 he performed arthroscopic surgery to the right knee. At that time he found a meniscal tear which was debrided. He also found an osteocartilaginous loose body. He also documented grade 2-3 degenerative changes of the medial compartment of the knee. Following surgery Mr. DiFroscia returned to work on February 24, 1997. Four days later, on the 28th of February, Mr. DiFroscia again slipped and fell off the side of a boat, falling a height of approximately 3-4 feet. He reinjured the right knee in so doing. Dr. Carlow diagnosed a contusion and treated it symptomatically. Mr. DiFroscia was able to return to work on March 17, 1997. In November 1997 Mr. DiFroscia returned to Dr. Carlow complaining of bilateral shoulder pain and persistent right knee symptomatology. Dr. Carlow determined that he had subacromial tendinitis bilaterally. On the basis of Mr. DiFroscia's bilateral shoulder conditions, his right knee condition, and conditions of the right upper extremity which will be described below, Dr. Carlow thought that Mr. DiFroscia should retire from Electric Boat.

"Sometime in 1995 Mr. DiFroscia began to experience discomfort

and numbness in the hands. Electrodiagnostic work up through Dr. Moalli revealed bilateral carpal tunnel syndrome with ulnar nerve compression at Guyon's canal, in addition to small fiber neuropathy consistent with white finger disease. He came under Dr. Tom Cherry's care for this condition. Dr. Cherry also diagnosed multiple trigger fingers. Persistent symptomatology led to surgery on May 14, 1996, at which time Dr. Cherry performed a left carpal tunnel release, as well as decompression of Guyon's canal. Also, trigger finger releases of the second, fourth and fifth digits. On July 2, 1996 Dr. Cherry performed a right carpal tunnel release with Guyon's canal decompression. Following these surgeries, Mr. DiFroscia was experiencing persistent dysesthesias in the ulnar nerve distribution. In January 1997 electrodiagnostic studies revealed bilateral cubital tunnel syndrome. On June 17, 1997 Dr. Cherry performed a left ulna nerve transposition and on September 2, 1997 a right ulnar nerve transposition...

"Relative to the aforementioned conditions Mr. DiFroscia is reporting that his right knee feels like 'mush'. He has marked difficulty on stairs. He walks relatively comfortably on level ground but after prolonged periods of time on his feet the knee will tend to buckle. After a long period of time on his feet he will have pain at rest. He denies any low back, right hip for left knee symptoms.

"He complains of right shoulder pain. It is not particularly worse at night. It is brought on by exertional activity, in particular reaching away from the plain of his body.

"He reports persistent episodic dysesthesias in the left wrist and hand more so than the right. The dysesthesias appeared to be in the ulnar nerve distribution. They are admittedly, however, episodic in nature. This comes on about two to three times a day for brief periods of time. They abate spontaneously.

"On examination Mr. DiFroscia is pleasant and cooperative. He walks with a mild degree of right sided antalgia. He had difficulty squatting and stepping up on the exam stool with the right lower extremity. His low back and hip examinations are benign. He has a 3+ effusion of the right knee. He has a very modest varus attitude of the right knee with slight varus thrust in stance phase. He has full range of motion of the right knee with mild parapatellar crepitation. He has trace medial collateral laxity. Negative Lachman testing. Normal parapatellar examination. He has marked medial joint line tenderness and markedly positive meniscal stressing maneuvers. Distally he has trace edema. He has 1-2+ pedal pulses and neurologically he is intact in the lower extremities. Examination of the upper extremities reveals no atrophy of both

forearms, thenar, or hypothenar musculature bilaterally. He has well healed carpal tunnel and cubital tunnel scars bilaterally. They are not sensitive. He has negative Tinel's signs at the elbow and the wrist bilaterally. Sensory motor function is grossly intact.

"Examination of the right shoulder reveals very mild subacromial bursal signs. No frank impingement and negative rotator cuff testing. AC joint minimally tender. Biceps tendon intact. Neck examination within normal limits. Upper extremity neurological grossly intact.

"X-rays of the right knee dated 11/96 accompany Mr. DiFroscia. No more recent x-rays are available. They are non-weight bearing views. They show 50% loss of medial compartment joint space in the right knee despite being non-weight bearing views.

"Impression: Medial meniscal tear right knee. Post meniscectomy arthrosis. This condition is the result of the work accident of November 1, 1994. Not significantly impacted by work injury of February 28, 1997. He also has low grade subacromial tendinitis right shoulder resulting from long time work activity at Electric Boat and aggravated by work injury of 1994.

"Also, bilateral cubital and carpal tunnel syndromes, with white finger disease. These conditions are the result of his long term work activity at Electric Boat.

"For practical purposes he has reached maximum medical improvement with regards to all these conditions. For the right knee he carries a permanent impairment of 15% of the right lower extremity. This condition is in itself the result of the aforementioned work related injury. Relative to the right shoulder his diagnosis is subacromial tendinitis. For that condition he carries a 2% loss of the right upper extremity.

"Relative to the bilateral carpal tunnel syndromes he carries a 5% loss of each upper extremity. On the right side this would be in addition to the 2% loss issued for the right shoulder. As a result of the bilateral cubital tunnel syndrome he carries and addition 5% impairment of each upper extremity. Again, these impairments should be added to the aforementioned upper extremity impairments. The upper extremity neurological conditions are in their entirety the result of chronic work related activity at Electric Boat.

"Work restrictions relative to the knee condition include no bending, squatting, crawling or climbing. No carrying greater than twenty pounds.

"Relative to the right shoulder he should not be working with the right hand maintained at the chest level or above.

"Relative to the upper extremity conditions he needs to avoid repetitive power gripping, including pneumatic vibratory tools. Any repetitive use of the hands or the wrists should also be avoided. He needs to avoid exposure to extreme temperatures, in particular cold exposure.

"Of course with the aforementioned work restrictions he can't return to work at Electric Boat.

"Mr. DiFroscia denies being gainfully employed anywhere outside that of Electric Boat.

"I trust, Ms. Nadeau, that the aforementioned is complete enough to address your specific issues. If not, please advise."

Dr. Thomas C. Cherry, Jr., an orthopedic surgeon, has treated Claimant's bilateral hand/arm problems. (CX 3 at 36-51a) Dr. William N. Jones and Dr. James H. Derby have treated Claimant's November 5, 1994 right knee injury. (CX 4 at 52-63 and CX 5 at 54-58)

Dr. William A. Wainright has also examined Claimant at the Employer's request and the doctor concluded as follows in his letter to the Employer (RX 17):

"IMPRESSION: 65 year old man status post bilateral carpal tunnel syndrome release and cubital tunnel syndrome releases.

"Regarding these problems, he does have permanent work restrictions and should avoid the use of air-powered, vibrating tools. He should also avoid heavy lifting over 25 (pounds) and avoid repetitive use of the upper extremities.

"He has reached maximum medical improvement. This was at the time of his rating with Dr. Giacchetto on June 8, 1998. He does have a 3% disability of each hand due to his carpal tunnel syndrome. He has an additional 2% disability of each arm due to his cubital tunnel syndrome.

"Both these problems appear to be more likely than not related to his use of the arms while employed at Electric Boat. In my opinion, his previous 20-year history of work as a hair stylist makes these problems materially and substantially worse," according to the doctor.

The Employer has also referred Claimant for an examination by the Employer's medical expert, Dr. Philo F. Willets, Jr., and

the doctor concludes as follows in his most detailed, fifteen (15) page report (RX 19):

"DIAGNOSIS:

1. Status post partial resection torn right medial meniscus and removal of degenerative loose bodies right knee - with some mild limited motion and ongoing complaints and symptoms of right knee discomfort and pain.

2. Impingement right shoulder, with no sign of surgical rotator cuff lesion.

3. Status post release carpal tunnel syndromes and bilateral ulnar nerve transpositions for upper extremity neuropathy.

4. Status post angioplasty for coronary artery disease.

DISCUSSION: I will try to respond to your questions in order as follows:

1. *Is he currently disabled due to this injury and is it the sole cause of his disability?*

Mr. DiFroscia is partially disabled as a result of his right knee and also his right shoulder. These are not the sole cause of his disability. He has bilateral upper extremity neuropathies, well documented in the above notes. He also has undergone angioplasty for coronary artery disease, associated with a heart attack and with occasional ongoing angina.

Nor is any injury of November 5, 1994, the sole cause of his above complaints. Mr. DiFroscia's history appeared to be significantly flawed, by his own admission. He stated that he had earlier injured his right knee in 1993, although he may have been referring to the November, 1994, injury when so stating. He very probably had preexisting right knee degeneration. He very probably had shoulder tendon degeneration and impingement because of the many years of hair styling that he had done.

2. *If so, is he totally disabled or may he perform selected work?*

He is not totally disabled by virtue of his right knee and shoulder. With respect to his right knee and shoulder, he could do selected work.

3. *If capable of light work, what restrictions would you place on him?*

With respect to his right knee, he should avoid crawling, squatting, kneeling, and climbing vertical ladders. He should be able to sit down approximately every half hour for brief periods of time. There would be no other restrictions with respect to the right knee.

With respect to the right shoulder, he should avoid lifting more than 5 pounds above the mid chest level with his right hand, avoid more than an occasional use of the right hand overhead, and avoid pushing or pulling more than 35 pounds with the right hand. There would be no other restrictions with respect to the right shoulder.

Because of his unrelated cardiac condition, there probably would be some restrictions, but those would be outside the area of my expertise.

With respect to his unrelated upper extremity neuropathies, he should avoid vibrational tools or rapid repetitive hand motion.

4. *Has he reached a point of maximum medical improvement?* Yes.

5. *If so, when?*

I believe that Mr. DiFroscia reached maximum medical improvement with respect to the right knee as of July 30, 1997, when Dr. Carlow noted that he was doing well.

I believe he reached maximum medical improvement with respect to the right shoulder as of November 23, 1998, when he was noted to have been significantly improved by Dr. Carlow.

6. *If so, what percentage of the permanent functional loss of use pursuant to the Fourth Edition of the AMA **Guidelines** does he have due to this condition? Please apportion the impairment specific to the injury and the impairment attributable to the preexisting conditions or factors.*

Using as a guide The American Medical Association **Guides to the Evaluation of Permanent Impairment**, Fourth Edition, there is a permanent partial physical impairment determined as follows.

RIGHT SHOULDER: Based upon the objective findings of rare crepitus of the right shoulder and using Table 19 on page 59, there is a 10% permanent partial physical impairment of the right shoulder.

Based upon Table 18 on page 58, the right shoulder joint represents 60% of the upper extremity. Therefore, 10% of 60% equals 6% permanent partial physical impairment of the right

upper extremity due to the tendonitis.

APPORTIONMENT: Mr. DiFroscia worked as a hair stylist for 23 years before beginning work at Electric Boat Corporation. Hair styling is a profession that requires frequent and prolonged elevation of the extremities with chronic stress to the shoulder joint and rotator cuff tendon specifically. There was no documentation in the records reviewed of any single traumatic injury to the right shoulder sustained in November, 1994. Unfortunately, Mr. DiFroscia's own history appeared to be significantly flawed, and he had genuine difficulty in remembering dates and symptoms associated with those dates. In my opinion, of the 6% permanent partial physical impairment of the right upper extremity, 3% preexisted November, 1994, and if Mr. DiFroscia's history be correct, 3% permanent partial physical impairment of the right upper extremity was the result of the November 1994, injury.

RIGHT KNEE: With respect to having undergone a partial medical meniscectomy of the right knee and using Table 64 on page 85 of the AMA **Guides**, there is a 2% permanent partial physical impairment of the right lower extremity.

Based upon x-rays of the right knee and based upon a 3 millimeter cartilage space interval and using Table 62 on page 83 of the AMA **Guides**, there is another 7% permanent partial impairment of the right lower extremity.

The above impairments total 9% permanent partial physical impairment of the right lower extremity.

APPORTIONMENT: Mr. DiFroscia's history appeared to be significantly flawed. He initially stated that he had injured his knee in approximately 1993, had treated with Dr. Derby and then Dr. Jones, and that his ongoing right knee pathology caused it to give-way and caused him to fall in November, 1994. This history appeared to be varied, however. Assuming that Mr. DiFroscia's history be correct, the right knee was already compromised by the contusion sustained in 1993 and, because of its pathology, caused the knee to give-way in November, 1994. Based upon that, of the 9% permanent partial physical impairment of the right lower extremity, 4% preexisted the November, 1994, incident and 5% permanent partial physical impairment of the right lower extremity could fairly be apportioned to the fall of November 5, 1994.

7. *Is his injury of 11/5/94 causally related to his employment at Electric Boat Corporation?*

If the above history be correct, a fall sustained November 5, 1994, was causally related to his employment at Electric Boat Corporation.

8. *Did he have any previous condition or injury which would combine with this injury to make his present injury materially and substantially greater?*

Yes. He very probably had right shoulder tendonitis as a result of 23 years of work as a hair stylist. If his history be correct, he had previously injured his right knee at work, and that same knee gave way on November 5, 1994, to cause his additional injury. In addition, he stated that he first reported carpal tunnel symptoms in approximately 1991 or 1992 to the Yard Hospital. Therefore, his previous injuries and conditions, when combined with the fall of November 5, 1994, did produce materially and substantially greater injury than what would have been produced by the fall of November 5, 1994, alone.

9. *Could you ask the claimant if he has worked in any capacity since his injury? What physical activity does he engage in?*

He said that, other than working at Electric Boat Corporation itself, he had not worked at all or in any capacity since November, 1994. he said he currently is on Social Security and does not plan on returning to work.

Currently, he said he did housework one hour per day, walked on and one-half hours per day, shopped and ran errands one hour per day, watched television six or more hours per day, and read one hour per day.

Dr. Willetts reiterated his opinions at his deposition. (RX 2)

On the basis of the totality of this record[2], I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the

[2]In view of the severe snowstorm in Southeastern Connecticut the night before and morning of the hearing, Claimant was excused from attending the hearing due to his multiple medical problems and as the parties had preserved Claimant's testimony by deposition on October 22, 1999, the transcript of which is in evidence as CX 17.

witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS

56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer’s burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit, held that an employer need not rule out any possible causal relationship between a claimant’s employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id.**, 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible

connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral hand/arm problems, diagnosed as carpal tunnel syndrome, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping**

v. Nash, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant’s daily use of pneumatic tools for fifteen (15) years as a maritime employee has resulted in bilateral hand/arm problems, a condition medically diagnosed as carpal tunnel syndrome, that the date of injury for such occupational/repetitive trauma disease is June 26, 1995, that he underwent left carpal tunnel release on May 14, 1996 and right carpal tunnel release on July 2, 1996 (CX 3 at 47), that Claimant also underwent “staged bilateral subcutaneous ulnar nerve transpositions on June 17, 1997 to the left elbow and on September 2, 1997 to the right elbow (CX 3 at 39-46), that Dr. Cherry, as of August 22, 1996, imposed restrictions against use of “grinding or other vibratory tools (CX 3 at 45) and against ladder climbing, as of January 8, 1998, as “this is a risk activity” and against doing “overhead work for other than 3-5 minutes at a time, no more than 3-4 times in a given hour (CX 3 at 38) and that Dr. Cherry rated Claimant’s disability as

permanent as of that date. (CX 3 at 37) I also find and conclude that the Employer had timely notice of such injury, authorized appropriate medical care and treatment and paid him appropriate benefits as he was unable to return to work with those restrictions. In fact, the principal question is the nature and extend of Claimant's disability, and issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a painter. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). Moreover, Albert J. Sabella, M.S., a Certified Vocational Rehabilitation Counselor, has opined that Claimant is totally disabled by reason of his age, his multiple medical problems and his physical limitations. (CX 16 at 148-153) I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.

General Dynamics Corporation v. Benefits Review Board, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf**

Stevedore Corp., 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on January 7, 1998 and that he has been permanently and totally disabled from January 8, 1998, according to the well-reasoned opinion of Dr. Cherry. (CX 3 at 37)

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits while Claimant has been unable to return to work. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result

of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injuries. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **Director, OWCP v. Luccitelli**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), **rev'g Luccitelli v. General Dynamics Corp.**, 25 BRBS 30 (1991); **Director, OWCP v. General Dynamics Corp.,** 982 F.2d 790 (2d Cir. 1992); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new

injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v.**

General Dynamics Corp., 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked at the Employer's shipyard from 1983 through June 16, 1997 (JX 1), (2) that Claimant has sustained a number of injuries in shipyard accidents to this right knee on November 5, 1994 (RX 1) and on February 28, 1997 (RX 3), (3) that the Employer authorized appropriate compensation while he was unable to work (RX 11, RX 12), (4) that Claimant's daily use of pneumatic tools for fifteen (15) years has resulted in bilateral carpal tunnel syndrome and bilateral ulnar nerve neuropathy (RX 2), (5) that the Employer retained Claimant as a valued employee until he was forced to stop working because of his multiple orthopedic problems, (6) that he has sustained previous work-related industrial accidents prior to June 26, 1995, while working at the Employer's shipyard and (7) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability (**i.e.**, the above-described bilateral carpal tunnel syndrome, bilateral ulnar nerve neuropathy and his right shoulder problems) and his June 26, 1995 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Giacchetto (RX 16), Dr. Wainright (RX 17, RX 18), Dr. Willetts (RX 19, RX 20), Dr. Carlow (CX 2, RX 21) and Dr. Cherry. (CX 3) **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final accident on June 26, 1995, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on January 31, 2001 (CX 19), concerning services rendered and costs incurred in representing Claimant February 20, 1996 and December 21, 2000. Attorney Robert B. Keville seeks a fee of $11,607.05 (including expenses) based on 45 hours of attorney time at $200.00 per hour and 28.20 hours of paralegal time at $60.00 per hour.

The Employer has accepted the requested attorney's fee as reasonable in view of the benefits obtained and the hourly rates charged. (RX 22)

In light of the nature and extent of the legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $11,607.05 (including expenses of $915.05) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on January 8, 1998, and continuing thereafter for 104 weeks, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $1,139.79, such compensation to be computed in accordance with Section 8(a) of the Act.

2. After the cessation of payments by the Employer continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his June 26, 1995 injury on and after January 8, 1998. The Employer shall also receive a refund, with appropriate interest, of any overpayments of compensation made to Claimant herein.

4. Interest shall be paid by the Employer and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries referenced herein may require, even after the time period specified in the first Order provision above, subject to the provisions of Section 7 of the Act.

6. The Employer shall pay to Claimant's attorney, Robert B. Keville, the sum of $11,607.05 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between February 2, 1996 and December 21, 2000.

A
DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:jl